No. 82-1394

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CENTRAL FLORIDA ENTERPRISES, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
COWLES BROADCASTING, INC., *et al.*,
NATIONAL BLACK MEDIA COALITION, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF RESPONDENTS, NATIONAL BLACK MEDIA COALITION, *et al.*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the new comparative renewal policy adopted by the Federal Communications Commission, which favors incumbent licensees who are challenged at renewal time by a competing applicant by awarding the incumbent a comparative preference for having provided less than the best practicable service, is consistent with the mandate of 47 U.S.C. §309(e), where Congress established the competitive licensing process to ensure that only those applicants who will provide the best practicable service will receive a grant of a Commission broadcast license?

PARTIES TO THE PROCEEDING

The instant respondents are the National Black Media Coalition, Rosie Laster (a member of the Coalition and a resident of the service area of the television station in question), the Florida State Conference of Branches of the National Association for the Advancement of Colored People (the Daytona Beach and Orlando branches of which have members who reside in the station's service area), and Charles Cherry (president of the Conference and a resident of the service area) (these respondents will hereinafter be collectively referred to as "NBMC").

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STATUTORY PROVISIONS INVOLVED

The relevant portions of 47 U.S.C. §§309 and 310 are set forth in the appendix attached to this brief.

STATEMENT OF THE CASE

In Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 40 (D.C. Cir. 1978) ("Central Florida I"), App. B at A-275, the Court of Appeals described this litigation as a "typical comparative renewal case." In many respects, that characterization was, at the time it was made, accurate. However, the action taken by the Federal Communications Commission ("FCC" or "Commission") on remand from Central Florida I dramatically transformed this case into an extraordinarily atypical one. After three

decisions of its own[1/] and the remand from the Court of Appeals, the Commission saw fit to adopt a "new" comparative renewal policy and apply it to the applicants in this case. See Cowles Broadcasting, Inc., 86 F.C.C.2d 993, 996 (1981) ("Cowles IV"), App. A at 21-22. It is the inconsistency of that new policy with the statutory scheme established by Congress in 47 U.S.C. §309(e) that necessitates the grant of Central Florida Enterprises, Inc.'s ("Central") petition for writ of certiorari.

1/ Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976) ("Cowles I"), App. B at A-108; Cowles Florida Broadcasting, Inc., 62 F.C.C.2d 953 (1977) ("Cowles II"); Cowles Florida Broadcasting, Inc., 40 Rad.Reg.2d (P&F) 1627 (1977) ("Cowles III"), App. B at A-248.

Convoluted as the facts and procedural history of the case may appear, the relevant facts -- those that touch directly upon the issue presented herein -- are relatively simple. The question is whether the Commission's new policy so departs from the congressional intent underlying Section 309(e), as consistently interpreted by this Court,[2/] that the will of Congress has been thwarted. The sole, undisputed fact upon which the entire case ultimately turns is the Commission's assessment of the level of

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2/ See, e.g., Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); National Broadcasting Co. v. U.S., 319 U.S. 190 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

service afforded to the community by the incumbent licensee, Cowles Broadcasting, Inc. ("Cowles"). The Court need only determine whether the reward bestowed upon the incumbent for having provided that service measures up to the mandate of the Communications Act.

"[A] licensee who has given meritorious service has a 'legitimate renewal expectancy.'" FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 805 (1978) ("NCCB"), quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970). At the time that this case was first decided by the Commission (and at the time this Court made that statement in NCCB, see 436 U.S. at 782 n.5, 805), "meritorious" service

was defined as that which is "superior," Citizens Communications Center v. FCC, 447 F.2d 1201, 1213 (D.C. Cir. 1971), clarified, 463 F.2d 822 (1972) ("Citizens"), "far above average," Citizens, 463 F.2d 823, or "exceptional." Central Florida I, 598 F.2d at 57 n.94, App. B at A-306. In a comparative renewal case, only superior service would entitle the incumbent to a renewal expectancy that would be factored into the comparative balance in the form of a plus or preference of "major significance." Citizens, 447 F.2d at 1213. The Citizens Court specifically rejected, as incompatible with the competitive intent of Section 309(e), the notion proffered by the Commission

that "substantial" service -- that which is "solid and favorable," Central Florida I, 598 F.2d at 57 n.94, App. B at A-306; Cowles II, 62 F.C.C.2d at 955-56, "not exceptional," id., or "not above average," Central Florida I, 598 F.2d at 51, App. B at A-295 -- is entitled to any award of a renewal expectancy preference in a comparative renewal case. See Citizens, 447 F.2d at 1213-14, clarified, 463 F.2d at 823.[3/]

3/ While the Court of Appeals correctly noted the confusion and potential for mischief engendered by the Commission's ever-expanding lexicon for characterizing incumbent service, see Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 508 & n.27 (D.C. Cir. 1982) ("Central Florida II"), App. A at A-10, that problem should not distract this Court. The Court is neither being called upon to assess the level of service actually offered by Cowles -- the Commission has done that, see infra at 8-9 -- nor to redefine the terms used to describe that service. That, too, is within

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In Cowles I, 60 F.C.C.2d at 421-22, App. B at A-197-98, the Commission characterized Cowles' performance as "superior." On reconsideration, that characterization was downgraded to "substantial," Cowles II, 62 F.C.C.2d at 958, "above a level of mediocre service which might just minimally warrant renewal" in a noncomparative case. Id. at 955. See generally Central Florida I, 598 F.2d at 49, 56 n.94, 57-58, App. B at A-291-92, A-306, A-307-08. That characterization has not been altered since, see, e.g., Cowles IV, 86 F.C.C.2d

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the agency's province. The Court need only examine whether the level of service found to have been offered can be rewarded with a comparative renewal expectancy consistent with Section 309(e)'s competitive mandate.

at 995, 1007-08, 1012, and the Commission conceded below that it uses the terms "substantial" and "meritorious" today to mean precisely the same level of service that was characterized as "substantial" in Citizens. See FCC Brief in Central Florida II at 4 n.3, 20-21.

The central facet of the new comparative renewal policy announced in Cowles IV is the award to the incumbent of a comparative renewal expectancy preference based solely upon that "substantial" performance. The question for this Court is whether such an award is so inimical to the competitive atmosphere that Congress intended to foster by enacting Section 309(e) that this new Commission policy constitutes nothing less than an effort to

administratively amend that statutory provision.[4/]

4/ This is a goal that the Commission has historically pursued with great vigor. See, e.g., Central Florida I, 598 F.2d at 50 & n.62, App. B at A-293-94; Citizens, 447 F.2d at 1204 n.5.

SUMMARY OF ARGUMENT

I.

Section 309(e) of the Communications Act seeks to ensure that licensees will provide the best practicable service to their community. It does this through the competitive mechanism of the comparative hearing. The Commission has adopted a policy that comparatively favors incumbent licensees, even those who in the past have failed to provide the best practicable service, over a challenger who has demonstrated that he will do better. This policy is entirely inconsistent with Congress' intent that competition for licenses be full, fair and open, so as to permit the Commission to select the applicant who will provide the best practicable service.

ARGUMENT

I. THE COMMISSION'S NEW COMPARATIVE RENEWAL POLICY VIOLATES CONGRESS' INTENT, AS EXPRESSED IN SECTION 309(e), THAT ENTRY INTO THE BROADCAST MARKETPLACE SHOULD BE SUBJECT TO FULL, FAIR AND OPEN COMPETITION.

In enacting Section 309(e) of the Communications Act, Congress specifically intended that competition for broadcasting licenses be as robust as possible. "The policy of the Act is clear that ... the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) ("Sanders Bros."). The Commission's new comparative renewal policy, which

regulates competition between incumbent licensees and new applicants, defeats that congressional intent. The policy is designed to favor incumbent licensees, even those who have failed to provide the best practicable service in the past, over a challenger who demonstrates that he will do better.

Congress intended "that the field of broadcasting [be] one of free competition." Sanders Bros., 309 U.S. at 747. The goal of Section 309(e)'s comparative licensing process is to ensure that only those applicants who will "render the best practicable service" to the community will be selected. Id. at 475. "'[T]he Commission must determine from among the applicants before it which of them will, if licensed, best

serve the public.'" Citizens, 447 F.2d at 1206-07 (emphasis by the Court), quoting Federal Radio Commission, Second Annual Report to Congress at 169 (October 1, 1928). Since there are more persons who wish to broadcast than there are available frequencies, this Court has recognized that "comparative considerations as to the services to be rendered [should] govern[] the application of the [licensing] standard of 'public interest, convenience, or necessity.'" National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943) ("NBC v. U.S."), citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). In Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330-33 (1945) ("Ashbacker"),

this Court emphasized both the competitive "spirit," as well as the "letter" of Section 309(e), in holding that procedural ploys cannot be utilized to thwart direct competition for a license.

Prior to this case, the Commission followed the comparative renewal policy articulated in Citizens, see supra at 5-7, by awarding a comparative renewal expectancy preference only to those incumbents who in the past had provided the best practicable service. In its decisions leading up to Central Florida I, the Commission concluded, after some initial indecision, that Cowles had failed to provide the best practicable service. See supra at 8-9. Yet it still attempted to reward Cowles with a pre-

ference based upon past service. This the Central Florida I Court would not permit. See, e.g., 598 F.2d at 57, 60 n.15, App. B at A-307, A-313.

The Commission's response on remand was simply to change the policy, Cowles IV, 86 F.C.C.2d at 996, App. A at A-21-22, holding that other considerations were more important than awarding licenses only to those who, through the rigors of competition, had demonstrated that they would provide the best practicable service. Id. at 1013, App. A at A-45. Now, even an incumbent who had in the past failed to provide such service will be entitled to a comparative incumbency preference over its competitor. In awarding that preference here, the

Commission freely conceded that Cowles' "substantial" or "meritorious" service was something less than the best practicable. Id. at 996, 1012, 1016-17, App. A at A-21-22, A-44-45, A-51.[5/]

5/ There thus appears to be a curious ambivalence in the Commission's position vis-a-vis the merits of competition. While it appears to favor competition between those already admitted to the marketplace -- its existing licensees -- see, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), it now desires to skew the competition at the point of entry to the marketplace -- the licensing process -- in order to prevent the appearance of new competitors. See, e.g., Citizens, 447 F.2d at 1206. This is most troublesome, because "[p]lainly it is not the purpose of the Act to protect a licensee against competition." Sanders Bros., 309 U.S. at 475.

The Commission justified this new standard with citations to passages from this Court's decision in NCCB (e.g., "a licensee who has given meritorious service has a 'legitimate renewal expectancy,'" 436 U.S. at 805). See Cowles IV, 86 F.C.C.2d at 1014-16, App. A at A-47-50. The Court of Appeals agreed with the Commission's rationale almost en toto, Central Florida II, 683 F.2d 507, App. A at A-8, including that reliance upon NCCB. Id. at 506, 509 n.31, App. A at A-6-7, A-12.[6/]

6/ In NCCB, the question was, inter alia, whether all licensees who owned a newspaper and a broadcast station in the same market should be compelled to divest themselves of one of their holdings. Divestiture of a station would have required Commission scrutiny of the sale under 47 U.S.C.

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The essence of Central Florida II's holding is that "[i]f a stricter standard

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§310(d), which specifically prohibits the application of competitive principles to license transfer cases. The Court noted that most cross-owned stations had "displayed 'an undramatic but nonetheless statistically significant superiority' over other television stations." Id. at 807 (citations omitted). Given the limitations imposed by 310(d), the Court rightly found that preservation of the status quo in that context, based upon the values of industry stability and the retention of quality service, was most consistent with ensuring best practicable service. See 436 U.S. at 805-08.

However, unless this Court also meant in NCCB to substantially retreat from its holdings in Ashbacker, NBC v. U.S. and Sanders Bros., regarding the importance of seeking the best practicable service through full competition in the comparative licensing process, the new policy is utterly in conflict with Section 309(e). The best evidence of this comes from the Central Florida II Court's discussion of the Commission's rationale for comparatively favoring other than its best licensees. See infra at 21-23.

[for rewarding incumbent service] is desired by Congress, it must enact it. We cannot: the new standard is within the statute." 683 F.2d at 507, App. A at A-8. This must be juxtaposed to the holding of the Citizens Court, which was perhaps best summarized by Judge MacKinnon in his brief concurring opinion in that case.

> ... [U]nder the present statute as construed by Ashbacker..., I do not consider it possible to provide administratively that operating licensees who furnish program service "substantially attuned to meeting the needs and interests of its area *** [without] serious deficiencies *** will be preferred over a newcomer...." Such a policy would ..., in effect, substitute a standard of substantial service for the best possible service.... If such a change is desired, in my opinion, it must be accomplished by amendment of the statute.

447 F.2d at 1215 (emphasis in original).

The Central Florida II Court quotes at length from the FCC's justification for the new policy, claiming first that the application of the higher Citizens standard "'might ... deprive the community of an acceptable service.'" 683 F.2d at 507 (emphasis by the Court), App. A at A-8, quoting Cowles IV, 86 F.C.C.2d at 1013, App. A at A-45. However, there is a quantum difference between that which is acceptable and that which is the best; competition is intended to ensure the latter.[7/] Secondly,

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7/ Moreover, the Court of Appeals' fear that an "'acceptable'" incumbent might be "'replace[d by] ... an inferior one,'" id. (emphasis by the Court), is not germane. Congress specifically charged the Commission to seek the best and equipped it with every tool necessary to that task. See, e.g., NBC v. U.S., 319 U.S. at 217-20.

the Court of Appeals asserts that the Commission's new, lower standard will "'ensure quality service.'" Id. (emphasis by the Court). Congress, however, sought to ensure the highest quality service -- the best practicable. Finally, the Court relies on a fear of a "'haphazard restructuring of the broadcast industry.'" Id. But that potential for restructuring is precisely what Congress intended when it mandated the competitive renewal process. If some measure of industry stability is the price that must be paid for pursuing the goal of best practicable service, so be it. Congress has made that choice. See, e.g., Citizens, 447 F.2d at 1215 (MacKinnon, J. concurring); Staff of

Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Analysis of FCC's 1970 Policy Statement on Comparative Hearings Involving Regular Renewal Applicants at 9-12, 17-25, (Subcomm. Print 1970).

Section 309(e)'s "competitive spur" can operate in a meaningful fashion only when the award of a comparative renewal expectancy preference is limited to those incumbents who have provided the best practicable service -- i.e. "superior" service. Any other scheme results in "rigor mortis," the purpetuation of mediocrity. See, e.g., Citizens, 447 F.2d at 1213-14 & n.35; Comment, The

Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?, 118 U.Pa.L.Rev. 368 (1970). Thus, while the Court of Appeals emphasizes that the "renewal expectancy [for less than the best practicable service is to] be factored in[to the comparison] for the benefit of the public," Central Florida II, 683 F.2d at 507 (emphasis by the Court), App. A at A-9, that benefit is, by the Court of Appeals' and the Commission's own logic, something less that the benefit Congress intended.[8/]

8/ It must be recalled that at the time that the NCCB Court made reference to the renewal expectancy for "meritorious" service, which the Commission and the Court of Appeals now proffer as justification for a lower standard, it was the Citizens

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To read Section 309(e) in the manner adopted by the Court of Appeals and the Commission is to ignore Congress' mandate that the licensing process -- the door through which competitive entry into the broadcast marketplace must take place -- be one of full, fair and open competition directed at ensuring the best practicable service. Ashbacker; NBC v. U.S.; Sanders Bros. This Court's review of the Commission's dramatic departure from that unambiguous mandate is therefore clearly warranted.

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standard of "best practicable" or "superior" that defined the scope of that preference in comparative renewal cases. See 436 U.S. at 782 n.5, 805.

CONCLUSION

As the result of the foregoing, NBMC respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Counsel wishes to acknowledge the invaluable assistance in the preparation of this brief of Citizens Communications Center legal intern Mark Van Ness, a third year student at Georgetown University Law Center.

STATUTORY APPENDIX

47 U.S.C. §309 provides in pertinent part:

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.... Any hearing subsequently held upon such application shall be a full hearing in which the

applicant and all other parties in interest shall be permitted to participate....

47 U.S.C. §310 provides in pertinent part:

* * *

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of

as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.